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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 162 53108 Office: California Service Center Date: JAN 09 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained, and the petition will be approved.

The petitioner is a private individual who is a widower and a retired lieutenant commander in the U.S. Navy. The petitioner seeks to employ the beneficiary permanently in the United States as a home attendant. Accordingly, the petitioner filed the current petition to classify the beneficiary as an other worker, pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(iii). The director determined that the petitioner had not established that he had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa and continuing.

On appeal, counsel submits a brief and additional evidence.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is November 22, 1996. The beneficiary's salary as stated on the petition is $525.60 per week or $27,331.20 per annum.

Pursuant to a request of the director, the petitioner submitted copies of his 1996 through 2001 Internal Revenue Service (IRS) Forms 1040. The tax returns showed adjusted gross incomes of $1,552; $3,279; $1,200; $1,302; $2,698; and $2,219 respectively. The tax returns which had been prepared by the petitioner's accountant were accompanied by two statements from

the accountant. In the statements, the accountant noted that the petitioner's home is valued at over one million dollars with no mortgage, that he receives a monthly pension from the U.S. Navy, a monthly payment from Social Security, and has in excess of $150,000 invested in the stock market.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director's decision was based solely on an examination of the petitioner's tax returns.

On appeal, counsel submits copies of the petitioner's bank statements from 1996 through 2001, and evidence that the petitioner receives a monthly payment from Social Security of $2,179.00, and a monthly payment of $1,569.00 from Defense Finance and Accounting Service. From his pension and Social Security, the petitioner receives a total of $44,976 a year.

The director's generic request for evidence asked for annual reports, federal tax returns, or audited financial statements as evidence of ability to pay the wage. In his decision denying the petition, he cited 8 C.F.R. § 204.5(g)(2) and made reference to the petitioner's federal tax returns as being insufficient evidence of such ability. We note that this same regulation also states that the director, in appropriate cases, may request additional evidence of ability to pay the wage.

It should be apparent that an elderly, retired person is not going to show much in the way of income on a federal tax return. As noted above, the petitioner did present two statements from his accountant regarding other sources of income. Apparently, the director considered this evidence of little value. He makes no mention of it in his decision. In a case such as this, if the director felt that the accountant's statements were unsupported, he could have requested specific additional evidence pursuant to 8 C.F.R. § 204.5(g)(2).

The labor certification and the petition indicate that the petitioner is elderly and requires care. Supporting documentation submitted with the petition, or on request of the director, indicates that the petitioner is retired. Besides focusing on the petitioner's tax returns, the director might have broadened his view and more fully examined the case prior to issuing his request for evidence, prior to rendering his initial decision, and when conducting his review of the appeal as required by 8 C.F.R. § 103.3(a)(2).

The annual proffered wage in this case is $27,331.20. Evidence submitted on appeal, including bank records of the direct deposit of the petitioner's pension and Social Security checks, support the statement of the petitioner's accountant, that his annual income from these two sources has ranged from a figure in excess of $38,000 in 1996 to a figure in 2001 of almost $44,000. The petitioner can pay the proffered wage of $27,331.20 from this amount. There is nothing in the record to indicate that he has any other extraordinary expenses or debts.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The director's decision is withdrawn, and the petition is approved.